IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 09.06.2021

C O R A M

THE HON'BLE Mr.JUSTICE S.M.SUBRAMANIAM

W.P.No.12502 of 2021
and
WMP.No.13274 of 2021

M/s.Tubeknit Fashions Limited,
No.137, Kanchivaram,
Vijayapuram Post,
Nallur, Tirupur 641 606.
Rep.by its Managing Director ... Petitioner

Vs

The Deputy Commissioner of Customs (BRC - DBK)
Chennai - IV, Customs House, 60 Rajaji Salai,
Chennai - 600 001. ... Respondent

Writ Petition filed under Article 226 of the Constitution of India pleased to issue a writ of certiorari to call for the records of the respondent in order-in-original No.82357/2021 dated 27.03.2021 (DIN:20210373MZ00000FF55) and quash the same.

For Petitioner ... Mrs.D.Naveena

For Respondents ... Mr.Rajnish Pathiyil
Senior Panel Counsel

O R D E R

The writ on hand is filed challenging the order in original dated 27.03.2021 passed by the sole respondent.

2. The impugned order demanding Duty Drawback for non realisation of export proceeds is questioned mainly on the ground that the respondent has violated the principles of natural justice. The learned counsel for the petitioner made a submission that no personal hearing was provided to the petitioner to put forth their defence and therefore the impugned order is liable to be set aside. It is further contended that the reply letter dated 31.03.2017, the Chartered Accountant's Certificate submitted in terms of the Board Circular No.5/2009 dated 07.02.2009 and the letter dated 13.03.2021 were not considered by the respondent and for all these reasons the impugned order is pervase. At the out set it is contended that sufficient opportunity of personal hearing has not been extended to the petitioner and therefore the

respondent has committed an act of violation of principles of natural justice.

3. The learned Senior Panel Counsel appearing on behalf of the respondent disputed the said contention by stating that opportunities were afforded to the petitioner. The Commissioner of Customs, Chennai - IV issued Public Notice No.02/2018 dated 08.01.2018 wherein common personal hearing was notified to all exporters whose BRC was not realised for the period 2004-2014. The said Public Notice was uploaded on the website of Chennai Customs viz., chennaicustoms.gov.in and also forwarded to FIEO and Custom Broker Associations for circulation among its members. However, the exporter has not responded, in spite of several opportunities given to appear in person or through his authorised representative to produce evidence for the sale proceeds in respect of the above mentioned shipping bills. Further personal hearing were issued to the exporter vide letter dated 01.03.2021 in F.No.S.Misc.2/145/2016-DBK (BRC) giving 08.03.2021, 09.03.2021, 10.03.2021 as dates for scheduled personal hearing. However, the exporter has neither responded to the said personal hearing letter dated 01.03.2021 nor appeared for above mentioned hearing dates. It is contended that several opportunities were given to the petitioner to defend their case in the manner prescribed. Therefore the petitioner cannot now approach this Court with incorrect facts regarding the opportunities provided to the petitioner by the respondent to defend their case.

4. This Court is of the considered opinion that even in such circumstances the grievances if at all exists the same can be exhausted by filing an appeal before the appellate authority under the provisions of the Customs Act. The introductory paragraph of the impugned order states that an appeal against the order lies with the Commissioner of Customs (Appeals), Custom House, 5th floor, Chennai 600 001, under Section 128(1) of the Customs Act, 1962, within 60 days of communication of this order. Thus the petitioner is very much aware of the appellate remedy contemplated and such an appellate remedy is also informed to the petitioner even through the impugned order. However without exhausting the appellate remedy the present writ petition is filed by merely stating that the respondent has violated the principles of natural justice. Such legal grounds can be adjudicated by the appellate authority namely the Commissioner of Customs (Appeals) and therefore entertaining the writ petition at this juncture would deprive the litigant from availing the benefit of appellate remedy which is undoubtedly valuable and important.

5. This Court has elaborately considered the issues with reference to preferring a statutory appeal before approaching the High Court under Article 226 of the Constitution of India in judgment dated 15.04.2021 in W.P.No.3144 of 2016 and the

relevant paragraphs are extracted hereunder:

"7.In order to avoid the Pre-Deposit, which is contemplated under the Statute, the practice of filing writ petitions is prevailing in the High Court and the High Court cannot encourage such practice and the appellate remedy contemplated under the Act is to be exhausted in all circumstances and only under extraordinary circumstances, in order to mitigate injustice, the High Court can intervene and not otherwise. Such power of dispensing with the appeal remedy is to be exercised sparingly and not in a routine manner. The learned Senior Standing Counsels reiterated that, in respect of the writ petitions on hand, the original assessment order has been passed either by the Joint Commissioner or by the Commissioner of Customs. Against such original orders passed by the original authorities under the provisions of the Customs Act, an appeal is contemplated under Sections 128 and 129 of the Customs Act, respectively. Without exhausting the appellate remedy, the writ petitioners have filed these writ petitions, and therefore, the writ petitions are liable to be dismissed.

8.With reference to the appellate remedy, the Hon'ble Division Bench of this Court in W.A.No.640 of 2021 [M/s.Fourceess Diamond Pvt. Ltd. and another v. The Joint Commissioner of Customs (Air Cargo), Meenambakkam, Chennai] delivered a judgment on 25.02.2021 and the relevant paragraphs are extracted hereunder :

"8.After elaborately hearing the learned counsel for the appellants and the learned Senior Standing Counsel appearing for the respondent, we are of the view that the issues raised in the writ petition are not purely questions of law, but mixed questions of fact, which would require a process of adjudication. Such matters cannot be decided by a Writ Court based on affidavits. Therefore, we do agree with the ultimate conclusion of the learned Writ Court that the appellant should avail the alternate remedy available under the Act.

9.For the reasons, which we have assigned in the preceding paragraph, the Writ Appeal stands dismissed and the appellants are granted 60 days time from the date of receipt of a copy of this judgment to file an appeal before the Commissioner of Customs (Appeals) and if the same is filed, the Commissioner of Customs (Appeals) shall entertain the appeal, without reference to the limitation as the writ petition was filed before this Court in the year 2016, which is well within the period of limitation, had the appellants filed appeals before the Commissioner of Customs (Appeals) at the relevant point of time.

10.Since the learned counsel for the appellants submitted that the certified copy of the impugned order was filed in the writ petition, the Registry is directed to return the impugned original order filed in the writ petition, after retaining a photostat copy. No costs. Consequently, connected miscellaneous petition is closed."

11.This Court is of the considered opinion that all such grounds raised on merits are to be adjudicated with reference to the documents and evidences to be produced and the scope of the writ petition under Article 226 of the Constitution of India cannot be expanded so as to exercise the powers of the appellate authority in the matter of examination or scrutiny of original documents and evidences produced by the respective parties. The very purpose of the statutory appeal is to scrutinize the orders passed by the original authorities, and therefore, the legislative intention in this regard is to be scrupulously followed in the mater of adjudication of merits with reference to the documents and evidences.

12.In common parlance, Statutes contain appeal provisions. In some of the Statutes, there are two-tier appeal provisions in order to ensure that the facts, grounds, evidences are appreciated and the grievances are redressed in the manner known to law. Such appeal provisions are provided with the legislative intention to provide remedy to the aggrieved persons. The High Court, in normal circumstances, would not interfere nor dispense with the appellate remedy.

13.The High Court cannot adjudicate the facts and merits with reference to documents and evidences. Trial is not entertainable under Article 226 of the Constitution of India. All such procedural aspects are to be followed by complete adjudication/trial by the original authorities as well as by the appellate authorities under the provisions of the Statute and the powers under Article 226 of the Constitution of India is limited to find out whether the processes contemplated under the Statutes and the procedural aspects are followed by the competent authorities as well as the appellate authorities or not. The High Court, under Article 226 of the Constitution of India, is not expected to usurp the powers of the appellate authorities by adjudicating the merits of the matter on certain documents and evidences. In the event of adjudication of merits under Article 226 of the Constitution of India in the absence of complete trial with reference to the documents and evidences, there is a possibility of miscarriage of justice, and therefore, the High Court is expected to be cautious, while entering into the venture of adjudication of certain merits with reference to the original documents and evidences produced by the respective parties to the lis. This being the legislative intention, High Court is expected to trust the institutional authorities as well as the hierarchy of institutions contemplated under the Statutes. Institutional respects are of paramount importance for providing complete justice to the parties and the various stages of adjudication are important for the purpose of correcting omissions, commissions, errors in appreciation of evidence, etc. Powers of the High Court under Article 226 of the Constitution of India cannot be extended nor widened so as to allow lay hands on the facts and circumstances by conducting the trial, nor certain facts and circumstances with reference to documents and evidences can be assumed or presumed or inference can be drawn, which is not preferable.

15.As far as the judgment of the Hon'ble Supreme Court of India in the case of M/s.Canon India Private Limited (supra) is concerned, as rightly pointed out by the learned Senior Standing Counsels appearing on behalf of the respondents that the matter went to the Hon'ble Apex Court by way of regular appeal and the Hon'ble Supreme Court of India, while adjudicating the final orders passed by the Appellate Tribunal, formed an opinion that the issuance of show cause notice itself was by an improper authority. Thus, by citing the said finding, the appellate remedy otherwise provided under the Statute cannot be dispensed with, and in the event of accepting the said contention, in all such cases, every litigant will approach the High Court by way of writ petition bypassing the appellate remedy, which is not desirable and cannot be accepted. As observed earlier, Institutional respect is of paramount importance. Even the point of jurisdiction, limitation, error apparent on the face of the record, are on merits and all are to be adjudicated before the appellate authority and the appellate authority, more specifically, the Appellate Tribunal or the Commissioner (Appeals), as the case may be, is empowered to adjudicate all such legal grounds raised by the respective parties and make a finding on merits. Thus, usurping the powers of the appellate authorities by the High Court by invoking its powers under Article 226 of the

Constitution of India is certainly unwarranted. The parties must be provided an opportunity to approach the appropriate authorities for redressal of their grievances in the manner known to law. In the event of entertaining all such writ petitions, the High Court will not only be over-burdened, but usurping the powers of the appellate authority is certainly not desirable.

18.Large number of writ petitions are filed without exhausting the statutory appeal remedies and High Court is also entertaining such writ petitions in a routine manner. Keeping such writ petitions pending for long time would cause prejudice to the interest of the assessee also. Thus, such statutory provisions regarding the appeal are to be decided at the first instance, enabling the litigants to avail the remedy by following the procedures as contemplated under law. Such writ petitions are filed may be on the ground of jurisdiction or otherwise. However, the Courts are expected to ensure that all such legal grounds available to the parties are adjudicated before the proper Forum and only after exhausting the statutory remedies, writ petitions are to be entertained. In the absence of exhausting such remedies, High Court is loosing the benefit of deciding the matter on merits as the High Court cannot conduct a trial or examine the original records in the writ proceedings under Article 226 of the Constitution of India. Thus, the Courts shall not provide an unnecessary opportunity to the assessee to escape from the liability merely on the ground on jurisdictional error, which is rectifiable.

19.This being the facts and circumstances established, this Court has no hesitation in arriving at a conclusion that the petitioners are bound to exhaust the appellate remedy, either under Section 128 or Section 129 of the Customs Act, respectively. Thus, the petitioners are at liberty to approach the appellate authority and file an appeal by following the procedures contemplated and by complying with the conditions to prefer the appeal, within a period of 60 days from the date of receipt of a copy of this order, and in the event of filing of appeal(s) by the writ petitioners within a period of 60 days, all such appeals are directed to be entertained without reference to the period of limitation, and the matters are to be adjudicated on merits and in accordance with law and by affording opportunity to all the parties, and the appeals are to be disposed of as expeditiously as possible."

6. With these observations, the writ petition stands dismissed. No costs. Consequently, connected miscellaneous petition is also closed.

Sd/-

Assistant Registrar (CS-IV)

//True Copy//

Sub Assistant Registrar

dpq

To

The Deputy Commissioner of Customs (BRC - DBK)
Chennai - IV, Customs House, 60 Rajaji Salai,
Chennai - 600 001.

+1cc to Mr.Rajnish Pathiyil Advocate, S.R.No. 27679
+1cc to Mr.S.Durai Raj, Advocate, S.R.No. 27576

W.P.No.12502 of 2021
and WMP.No.13274 of 2021

UM(CO)
GN(20/07/2021)